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No. (1)

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Supreme Court of the United States

COYOTE PUBLISHING, INC., dba High Desert Advocate; HOWARD COPELAN, Publisher of the High Desert Advocate; BOBBI A. DAVIS, dba the Shady Lady Ranch; DR PARTNERS, dba Las Vegas CityLife, a Nevada General Partnership; STEVE SEBELIUS, Editor of Las Vegas CityLife,

Petitioners,

—v.—

CATHERINE CORTEZ MASTO, in her official capacity as Attorney General of the State of Nevada,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in ruling that the State of Nevada can restrict truthful advertising about legal brothels by asserting its interest in opposing messages promoting the "commodification" of sex, despite this Court's cases holding that there is no "vice exception" to the First Amendment?

2. Whether *Central Hudson* applies to restrictions on disfavored political speech justified by a desire to suppress ideas rather than concerns related to regulating the market?

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceedings are identified in the caption of the case. Only the Attorney General appealed the district court's ruling. Two other defendants were named in the original complaint but did not participate in the appellate proceedings. First, the Secretary of State was named as a defendant in the original complaint but was dismissed from the proceedings by the district court. Second, the District Attorney of Clark County was also a defendant below but did not appeal the district court's decision.

STATEMENT PURSUANT TO RULE 29.6

Coyote Publishing, Inc. is the only corporate party. Its shares are wholly owned by respondent Howard Copelan and his wife. There is no parent corporation or publicly held company owning more than 10% of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals (App. 22a-63a) is reported at 598 F.3d 592. The opinion of the court of appeals denying rehearing en banc (App. 64a-65a) is unreported. The decision of the district court (App. 1a-21a) is also unreported.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on March 11, 2010. A petition for rehearing en banc was denied on July 29, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Nev. Rev. Stat. § 201.430. Unlawful advertising of prostitution; penalties

1. It is unlawful for any person engaged in conduct which is unlawful pursuant to paragraph (b) of subsection 1 of NRS 207.030, or any owner, operator, agent or employee of a house of prostitution, or anyone acting on behalf of any such person, to advertise the unlawful conduct or any house of prostitution:

(a) In any public theater, on the public streets of any city or town, or on any

public highway; or

(b) In any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute.

2. It is unlawful for any person knowingly to prepare or print an advertisement concerning a house of prostitution not licensed for that purpose pursuant to NRS 244.345, or conduct which is unlawful pursuant to paragraph (b) of subsection 1 of NRS 207.030, in any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute.

3. Inclusion in any display, handbill or publication of the address, location or telephone number of a house of prostitution or of identification of a means of transportation to such a house, or of directions telling how to obtain any such information, constitutes prima facie evidence of advertising for the purposes of this section.

4. Any person, company, association or corporation violating the provisions of this section shall be punished:

(a) For the first violation within a 3-year period, by imprisonment in the county jail for not more than 6 months, or by a fine of not more than $1,000, or by both fine and imprisonment.

(b) For a second violation within a

3-year period, by imprisonment in the county jail for not less than 30 days nor more than 6 months, and by a fine of not less than $250 nor more than $1,000.

(c) For a third or subsequent violation within a 3-year period, by imprisonment in the county jail for 6 months and by a fine of not less than $250 nor more than $1,000.

Nev. Rev. Stat. § 201.440. Unlawful to permit illegal advertising of houses of prostitution; penalties

1. In any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute, it is unlawful for any person, company, association or corporation knowingly to allow any person engaged in conduct which is unlawful pursuant to paragraph (b) of subsection 1 of NRS 207.030, or any owner, operator, agent or employee of a house of prostitution, or anyone acting on behalf of any such person, to advertise a house of prostitution in his or her place of business.

2. Any person, company, association or corporation that violates the provisions of this section shall be punished:

(a) For the first violation within a 3-year period, by imprisonment in the county jail for not more than 6 months, or by a fine of not more than $1,000, or

by both fine and imprisonment.

(b) For a second violation within a 3-year period, by imprisonment in the county jail for not less than 30 days nor more than 6 months, and by a fine of not less than $250 nor more than $1,000.

(c) For a third or subsequent violation within a 3-year period, by imprisonment in the county jail for 6 months and by a fine of not less than $250 nor more than $1,000.

STATEMENT OF THE CASE

This case involves a challenge by Petitioners to content-based and viewpoint-based restrictions on truthful, non-misleading commercial speech concerning legal, licensed brothels in Nevada, as set forth in Nev. Rev. Stat. §§ 201.430 and 201.440. Petitioners are two newspapers and one legal brothel. Respondents are public officials charged with enforcement of the statutes in question.

Nevada permits the licensing of legal brothels within the state. *See* Nev. Rev. Stat. § 201.354(1) ("It is unlawful for any person to engage in prostitution or solicitation. . . except in a licensed house of prostitution."). Nev. Rev. Stat. § 244.345(8) prohibits the licensing of legal houses of prostitution in counties with populations exceeding 400,000. This includes Clark County, Nevada, where Las Vegas and petitioner Las Vegas CityLife are located and most of CityLife's distribution occurs, as well

as Washoe County, where Reno is located. Prostitution is also prohibited in Carson City and in certain Nevada counties where it is banned at county option.

On March 16, 2006, Petitioners brought a facial challenge to the constitutionality of Nev. Rev. Stat. §§ 201.430 and 201.440. On cross-motions for summary judgment, the district court held that the challenged statutes violate the First and Fourteenth Amendments and enjoined their enforcement. App. 18a-19a. Generally applying the four-part test for commercial speech set forth in *Central Hudson Gas & Elec. Co. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), the district court ruled that respondents "failed to meet their burden of demonstrating that the provisions containing the prohibition of advertising for legal brothels on streets, highways and theaters throughout the State of Nevada is narrowly tailored to effectuate a substantial government interest." App. 14a.[1] In reaching this conclusion, the district court specifically rejected any reliance on a "vice exception" to *Central Hudson*, citing this Court's decision in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). App. 14a.

The Ninth Circuit reversed. Although acknowledging this Court's precedent

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[1] The district court held that one provision of the challenged statutes – N.R.S. § 201.430(3) – "extends to more than commercial speech" and is therefore subject to strict scrutiny, which it also failed. App. 8a.

prohibiting a "vice exception" to the First Amendment, the court of appeals ruled that advertising for legal brothels is *sui generis,* and thus could be upheld, despite this Court's case law, based on the state's "substantial interest" in limiting the dissemination of a message that the court of appeals characterized as the "commodification" of sex. App. 44a. There are only two ways to understand this ruling: either it permits courts to resurrect the "vice exception" on a case-by-case basis, or it permits government to suppress speech because of disagreement with its message or viewpoint. On July 29, 2010, Petitioners' request for an en banc review was denied. App. 64a-65a.

REASONS FOR GRANTING THE PETITION

In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), this Court upheld a restriction on commercial speech based on the theory that the "greater" power to ban gambling included the "lesser" power to ban advertising about it. That premise is no longer good law. On three separate occasions since *Posadas*, this Court has expressly rejected the so-called "vice exception" to otherwise applicable First Amendment rules. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 566 (2001) (tobacco); *Greater New Orleans Broad. Ass'n, Inc. v. Reilly*, 527 U.S. 173, 195-96 (1999) (gaming); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 511-512 (1996) (plurality opinion)

(alcohol).

The decision below effectively resurrects this discredited notion, arguing that the "vice exception" can be accepted or rejected on a case-by-case basis, depending on the "vice" at issue. Its ruling is therefore inconsistent with this Court's controlling law. While legalized prostitution may be unique to Nevada, this Court's rules governing commercial speech apply nationwide and their consistent application is a matter of national importance.

In addition, this case raises the fundamental question of whether the relaxed *Central Hudson* test or strict scrutiny is the appropriate standard for evaluating viewpoint-based restrictions on commercial speech that, as here, are purportedly justified by the desire to suppress disfavored ideas.

I. The Decision Below Rests On A "Vice Exception" To The First Amendment That This Court Has Repeatedly Rejected And An Attempt To Assess The Social Value Of Speech That This Court Has Recently Ruled Improper.

In three decisions over the past fifteen years, this Court has rejected the idea of a "vice exception" to the *Central Hudson* test for evaluating restrictions on commercial speech.[2]

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[2] *Central Hudson* created a four-part, intermediate level analysis for restrictions on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial

See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525; *Greater New Orleans Broad. Ass'n, Inc. v. Reilly*, 527 U.S. 173; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484.

As the Court explained in *44 Liquormart*:

> Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to "vice activity." Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market. The recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the "vice" label on selected lawful activities, or requiring the

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> speech to come within that provision, it must at least concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

> federal courts to establish a federal common law of vice. For these reasons, a "vice" label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity.

517 U.S. at 514 (citations omitted).

The Ninth Circuit acknowledged this general principle but then purported to carve an exception for lawful speech advertising lawful brothels. Describing that speech as *sui generis*, the Ninth Circuit concluded it "ought to be treated differently than other advertising bans on 'vice' activities." App. 35a. It did not invoke any "interest in preventing commercial harms," generally accepted as the basis for subjecting commercial speech to greater governmental regulation than noncommercial speech. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993). Instead, the Ninth Circuit justified the upholding of the statutes based on disapproval of the political message disseminated to the public and out of a desire to protect the public from the alleged general societal harms created by certain kinds of speech. App. 38a-48a.

In so holding, the Ninth Circuit made two fundamental errors. First, this Court's decisions after *Posadas* rejecting a "vice exception" were clear and unequivocal; they

did not incorporate a loophole and the Ninth Circuit was unable to cite any language from this Court supporting one (let alone any holding on point). The reason for that is both simple and fundamental. *Posadas'* embrace of the "vice exception" was based on the idea that restrictions on speech represented a "lesser" exercise of government authority than a total ban on activity regarded as socially unacceptable (assuming that activity is not independently protected by the Constitution). In later reversing course, this Court recognized that restrictions on truthful and non-misleading speech can never be regarded as "lesser" intrusions in our constitutional system. *See 44 Liquormart*, 417 U.S. at 510-512.

Second, the Ninth Circuit compounded its constitutional mistake in finding an exception where none exists by devaluing the speech at issue based on the message it conveys. Just last Term, however, this Court emphatically held in *United States v. Stevens*, 130 S.Ct. 1577 (2010), that the First Amendment does not permit the government to strip disfavored speech of its constitutional protection through ad hoc balancing. For this reason, the Court rejected the government's proposition that: "[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs," *id.* at 1585, stating that:

> As a free-floating test for First Amendment coverage, that sentence

> is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

Id.

Stevens involved depictions of animal cruelty. But, in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *affirmed* 475 U.S. 1001 (1986), the Court confronted a restriction on speech that, as here, the government attempted to justify because of its alleged negative impact on women.

> Indianapolis justifies [its anti-pornography] ordinance on the ground that pornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so. Pornography is an aspect of dominance. It does not persuade people so much as change them. It works by socializing, by establishing the expected and the permissible. In this view

> pornography is not an idea; pornography is the injury.

771 F.3d at 328. The Seventh Circuit held the Indianapolis ordinance unconstitutional, noting that "[t]he Constitution forbids the state to declare one perspective right and silence opponents," *id.* at 325, and this Court affirmed.

In language strikingly similar to the Seventh Circuit's in *Hudnut*, the Ninth Circuit in this case explained that "a central premise of the restrictions is that the advertising of prostitution is an integral aspect of, and exacerbates, the commodification of human sexuality on a society-wide basis." App. 39a. Here, as in *Hudnut*, however, that rationale is insufficient to justify the suppression of speech.

Nor can the Ninth Circuit's argument that legal brothels are *sui generis*, and therefore not subject to the "no vice exception" principle, circumvent the general rule. As Justice Thomas pointed out in *Lorillard*, the attempt to limit the impact of a decision upholding a "vice exception" by emphasizing the *sui generis* nature of the speech at issue has no principled stopping point. Concurring in this Court's invalidation of restrictions on tobacco advertising, Justice Thomas wrote:

> Underlying many of the arguments of respondents and their *amici* is the idea that tobacco is in some sense sui generis – that it is so special, so unlike any other object of regulation,

> that application of normal First Amendment principles should be suspended . . . . [I]t seems appropriate to point out that to uphold the Massachusetts tobacco regulations would be to accept a line of reasoning that would permit restrictions on advertising for a host of other products.

533 U.S. at 586-87 (citations omitted). That observation applies with equal force here.

II. Whether *Central Hudson* Applies to Restrictions On Disfavored Political Speech Justified By a Desire to Suppress Ideas Rather Than Concerns Related To Regulating the Market Is An Important Question Of First Amendment Law That This Court Should Resolve.

The decision below erroneously applied the *Central Hudson* test and can be reversed on that ground alone. But this case also raises an even more basic question: whether *Central Hudson* is the appropriate test when, as here, the government's justification for suppressing speech is disagreement with the underlying message rather than any interests concerning the fairness of the commercial transaction at issue.

Central Hudson represents a form of intermediate scrutiny for commercial speech that departs from the strict scrutiny that normally applies to speech restrictions. In that sense, it is closely related to *United States*

v. O'Brien, 391 U.S. 367 (1968), which likewise applies intermediate scrutiny when speech and conduct are combined in a single expressive act. To ensure that the regulation of conduct does not become a pretext for the regulation of speech, however, this Court has carefully limited *O'Brien* to situations where the government's regulation is not aimed at the suppression of speech. *Id.* at 377.[3]

The Court has applied the same caveat when applying intermediate scrutiny in other speech contexts as well. *See, e.g., Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984)(time, place and manner restrictions must be justified "without reference to the content of the regulated speech"); *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 48 (1986)(same for regulations addressing "secondary effects" of speech).

As interpreted by the Ninth Circuit in

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[3] As this Court explained when addressing flag burning during a political rally:

> If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. *See O'Brien, supra,* at 377, 88 S.Ct. at 1679. If it is, then we are outside of *O'Brien's* test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.

Texas v. Johnson, 491 U.S. 397, 403 (1989).

this case, the *Central Hudson* test poses the same constitutional risk and requires the same constitutional safety net. By repeatedly stressing its objection to speech promoting the "commodification" of sex, the Ninth Circuit made clear that its decision upholding Nevada's statutory scheme was viewpoint-based at its core, and not designed to ensure a fair marketplace. According to the Ninth Circuit, it was not the commercial nature of the speech that justified its regulation but, rather, the political message that sex is a commodity that can be sold. *See* App. 56a ("Nevada seeks to limit the message that sex may be bought and sold.").

When the government restricts speech for political reasons, it is not entitled to receive the same latitude given to viewpoint-neutral restrictions on speech designed to protect consumers engaged in commercial transactions.

Just as "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues," *Bolger v. Young Drugs Pro. Corp.*, 463 U.S. 60, 68 (1983), government should not be permitted to restrict the dissemination of unpopular ideas, unrelated to the regulation of commerce, merely because they occur in a commercial advertisement.

The "commonsense differences" between commercial and noncommercial speech, *Virginia State Bd. of Pharmacy v. Virginia*

Citizens Consumers Council, Inc., 425 U.S. 748, 771 n.24 (1976), begin to vanish quickly when the focus of the state's concern is the political content of a speaker's message.

> The interest in preventing commercial harms justifies more intensive regulation of commercial speech than noncommercial speech even when they are intermingled in the same publications. On the other hand, the interest in protecting the free flow of information and ideas is still present when such expression is found in a commercial context.

Discovery Network, 507 U.S. at 426 n. 21.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992), the Court chose a particularly relevant example to illustrate that point when it noted that "a state may not prohibit only that commercial speech that depicts men in a demeaning fashion."

The statement in *R.A.V.* may have been dicta, but it is one that has been echoed in other decisions. For example, in *44 Liquormart*, Justices Stevens, Kennedy, and Ginsburg wrote:

> When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional

> protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

517 U.S. at 501.

The commercial speech doctrine was designed to allow the government room to regulate the commercial marketplace, even when speech was involved, without having to satisfy traditional strict scrutiny. It was not designed to allow the government to ban or ration information or ideas that it deems objectionable for social or political reasons, even when the speech occurs in a commercial context. This Court rejected such paternalism when it first held in *Virginia Pharmacy* that commercial speech is entitled to constitutional protection. 425 U.S. at 770 ("Th[e] alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.").

Even more to the point, in *Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977), this Court invalidated a ban on

contraceptive advertising that the government justified as necessary to suppress a message that would "legitimize sexual activity" among youth. The Court rejected the argument that the expression of protected points of view in a noncommercial context can be banned simply because they are contained within commercial speech.

> Appellants suggest no distinction between commercial and noncommercial speech that would render these discredited arguments meritorious when offered to justify prohibitions on commercial speech. On the contrary, such arguments are clearly directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression the core of First Amendment values.

Id. at 702 n.28. As these cases indicate, allowing the government to circumvent the vigorous protections afforded political speech – even when communicated in a commercial context – is improper and not consistent with broader First Amendment principles.

Both *Carey* and *Virginia Pharmacy* were decided prior to *Central Hudson*. Yet, there is nothing in *Central Hudson* suggesting that one of the goals of the four-part analysis for commercial speech restrictions was to enable government to more easily restrict

disfavored viewpoints on controversial socio-political issues through use of less stringent constitutional scrutiny.

Allowing *Central Hudson's* analysis to justify restrictions on content-based and viewpoint-based restrictions is problematic, and a critical question for this Court. Indeed, through the years, "several members of the Court have expressed doubt about the *Central Hudson* analysis and whether it should apply in particular cases." *Lorillard*, 533 U.S. at 554 (citations omitted).[4]

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[4] The Ninth Circuit noted that: "[s]everal justices criticized the *Central Hudson* in subsequent cases, and the Court as a whole has acknowledged that criticism. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367-68 (2002)." App. 30a n.6. Moreover, lower courts have expressed confusion about how to apply *Central Hudson's* intermediate scrutiny instead of the strict scrutiny set forth in *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 388-389 (1992) when evaluating content-based and viewpoint-based commercial speech restrictions. *See, MD II Entm't, Inc. v. City of Dallas*, 28 F.3d 492, 493, 495 (5th Cir. 1994) (finding that restrictions did not meet the lesser standard, the Fifth Circuit nonetheless queried whether strict scrutiny should apply to content-based restrictions on commercial speech). Indeed, some courts just apply *both* tests. *See, e.g., Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1232-33 (E.D.N.Y. 1993) (applying both *Central Hudson* and *R.A.V.* and striking a ban on advertising "Crazy Horse" beer to meet the goal of decreasing the market for the product among Native Americans as failing to meet either test); *Citizens United For Free Speech II v. Long Beach Township Bd. Of Comm'rs*, 802 F. Supp. 1223, 1226 (D. N.J. 1992) (noting that strict scrutiny must apply to content-based restrictions on commercial speech but finding that an

Notwithstanding those doubts, this Court has never decided whether *Central Hudson* applies to restrictions designed to suppress ideas rather than to ensure fairness in the marketplace. It is an important question of First Amendment law squarely presented by the decision below.

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ordinance restricting and distinguishing between "for sale" and "for rent" signs designed to preserve property value and promote the aesthetic character of a neighborhood failed both tests).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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